IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1344 of 1986

For Approval and Signature:

HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

MIYAJIBHAI J MANKAD

Appearance:

1. Criminal Appeal No. 1344 of 1986

Mr K P Rawal, APP for Petitioner No. 1

MR Sunil Mehta for Mr SK BUKHARI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 05/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.P.BUCH)

This is an appeal filed under section 378 of Criminal Procedure Code, 1973 by the State of Gujarat in order to challenge a judgment and conviction order dated 7.8.1986 recorded by the 4th extra Asstt.Sessions Judge, Vadodara in sessions case No.106/84 under which the learned trial Judge acquitted the present respondent from an offence punishable under section 376 of IPC.

2. As per the case of the prosecution, the present respondent was working as building contractor and he had under him, a construction work of Siddharthnagar society at Vadodara. On 10.11.1983, prosecutrix Sarifa bibi was going on the road and the respondent met her on the way and told her that he would give her firewood. The prosecutrix was tempted by the aforesaid offer and, therefore, she accompanied the respondent to the place where the building was under construction. The respondent and the prosecutrix both went inside the room and according to the case of Sarifa bibi, the respondent committed rape on her in the said room. Thereafter, as per the case of the prosecutrix, threat was given to her for not conveying anything about the said incident to anyone and, therefore, she did not narrate the incident to anyone. That thereafter there was a passage of 7 to 8 months and at that point of time, her sister found enlargement of her abdomen and, therefore, on being enquired, she told her that there was some tumour in her abdomen. However, the sister suspected otherwise and ultimately she was taken to the hospital for medical check up and it was found that she was pregnant. On further enquiry, she revealed that the present respondent had committed rape on her before about 8 months. Therefore, the father of the victim filed FIR before the police station. The respondent was arrested, investigation was undertaken and at the close of the investigation, charge sheet was filed against the present respondent for an offence punishable under section 376 of IPC. Since the said offence was exclusively triable by a court of Sessions, the case was committed to the Court of Sessions. The learned Asstt.Sessions Judge provided the respondent with police investigation papers. Charge was prepared and framed at Exh.3. It was read over and explained to the respondent. He pleaded not guilty to the said charge. Therefore, evidence was recorded and at the close of evidence, further statement was recorded under section 313 of the Criminal Procedure Code, 1973. There the respondent contended that he had not committed any offence and he was falsely involved in the case. The trial court heard the arguments and came to a decision that though the victim was found to be below the age of 16 years, the prosecution has not satisfactorily proved

that the respondent had committed rape on her. Therefore, on appreciation of evidence, the trial court acquitted the respondent.

3. Feeling aggrieved by the said judgment and order of acquittal passed by the trial court, the State has preferred this appeal before this Court. It has been contended here that since the victim was proved to be below the age of 16 years, the question of her consent was not required to be considered. That the trial court ought to have accepted the version of the victim and convicted the present respondent. That therefore, the judgment and acquittal order of the trial court on rejecting the testimony of the victim, are illegal, erroneous and deserve to be set aside. The State has, therefore, contended that the present appeal be allowed, the judgment and acquittal order be set aside, the present respondent be convicted for an offence punishable under section 376 of IPC and he be sentenced accordingly.

4. On receipt of the appeal, leave was granted and appeal was admitted. Thereafter, the matter has come up before us at the stage of final hearing. Mr K P Rawal, learned APP has appeared on behalf of the State and Mr Sunil Mehta has appeared for Mr S K Bukhari, learned Advocate for the present respondent. Incidentally, they have taken us through the evidence on record and also through the observations made by the learned trial Judge during the course of judgment.

5. As said above, as per the case of the prosecution, on 10.11.1983, the respondent met the victim and told her that he would provide her firewood. The victim was tempted and, she agreed to go with the respondent. She actually went inside the room where the building was under construction and there, the respondent, as per the case of the victim, committed rape on her.

6. In order to prove the case, the prosecution has examined seven witnesses as follows:

1. PW 1 Dr.Sutappa Basu Exh.7
2. PW 2 Husenmiya Mahamadmiya Exh.18, father of the victim
3. PW 3 Jayantibhai Shankarbhai Exh.13
4. PW 4 Sarifa bibi Exh.15 victim
5. PW 5 Kantilal Hemabhai Exh.18 PSO who registered FIR
6. PW 6 Baldevsinh Chandansinh Exh.20 I.O.
7. PW 7 Kantibhai Virabhai Exh.21 I.O.

7. The prosecution has also produced certain documents on record as follows:

Exh.6	Panchnama
Exhs.8,9 and 10	Medical certificate
Exh. 12	FIR
Exh.14	Extract of register of birth & death
Exh.17	Birth certificate of the victim

8. In view of the above position, it would be necessary for us to refer to the evidence of Sarifa bibi Exh.15. She is the victim and she is the solitary witness to the incident in question. Even looking to the nature of the offence said to have been committed, she can be the only witness to the incident and admittedly no other person has seen the respondent committing the offence in question. Even the said offence would not be committed in presence of other witnesses.

9. This witness has deposed before the trial court that she has gone in search of firewood in the locality known as Siddharthnagar society. There the construction work was in progress and the respondent met her on the road. That the respondent told her that he would provide firewood to her and, therefore, she went inside the house with the respondent. There, according to the case of the victim, the respondent committed rape on her. She has also deposed that the respondent has threatened her that if she would convey the episode to anyone, she would be killed. She has also stated that she has not conveyed the incident to anyone else.

10. It is a matter of record that for about 7 to 8 months, the above said fact was not conveyed by her to anyone else. It is a matter of record that the victim was staying in her house with members of her family. Her father has deposed at Exh.11 that he has four daughters and three sons and all of them were staying together. Even the mother of the victim was staying there in the said family. Therefore, there were so many other members in the family with whom the victim was staying at relevant time. This shows that the victim had an opportunity to inform other members of the family about the offence said to have been committed by the respondent.

11. It is also required to be considered that if the victim could not inform the father, at least she could have informed the mother and sisters about the incident in question. She has not conveyed the said fact for nearly seven months. Even thereafter when it was found that there was enlargement of her abdomen and, on her sister specifically enquiring about the same, she conveyed that there was tumour in her abdomen. This also suggests that the victim had not told the truth even to her sister.

12. Then it is not the case of the victim that the respondent used to meet her very often and used to extend threats to her continously. It is not acceptable that the victim was under threats of the respondent continuously for a prolonged period of seven months. This shows that the story conveyed by the victim during the course of the evidence may not be true. Then some suggestions have been made in cross examination of the witness. It has also come on record that after the victim was invited in the room, the respondent came down from the upper floor. If the respondent had met the victim on the road and if both of them had entered the room then there was no question for the respondent to come from upstairs. This shows that the episode as has been deposed by the victim during the course of the evidence is not free from doubt. The victim has not deposed before the trial court that she had raised shouts at the time when rape was being committed on her. Even the FIR of the father also does not indicate that the victim had raised shouts. The sister to whom the incident was conveyed, has not been examined. Even D.N.A. test has not been carried out. Such a test would carry importance when the allegation of rape has come on surface after about 8 months when the victim had an advanced stage of pregnancy of about 8 months.

13. The respondent has suggested here that one Jamirbhai was known to the family of the victim. It has come on record that this Jamirbhai was very much close to the family of the victim. That this Jamirbhai used to visit the house of the victim very often. He used to take meals at that place very often. On some occasions, Jamirbhai used to sleep at the place of the victim. This shows the closeness of Jamirbhai and Bashirbhai, brother of the victim. They were working together. Therefore, as the respondent has suggested that Jamirbhai might have committed rape on her or that Jamir might have had

physical relations with the victim. It is true that the victim has denied the said suggestion. However, the probability has been created by showing the closeness and the relations between the victim and Jamirbhai.

14. It would be interesting to note here that questions were put to complainant-Husenmiya Mahamadmiya at Exh.11, the father of the victim, about Jamirbhai during the course of cross examination. The witness has totally denied having any relationship with Jamirbhai. He has denied that Jamirbhai was working as a contractor and as a stone mason. He has also denied that Bashir was staying with Jamirbhai. He has also denied that Jamirbhai used to stay and used to take meals with him. This shows that on the one hand the victim has admitted that Jamirbhai was very close to the members of the family, on the other hand, the father has totally denied the said fact. This conduct on the part of the complainant, the father of the victim, has also suggested many things. It has also been suggested in cross examination of the father that Bashirbhai had taken a loan of Rs. 600/- from the respondent and that the respondent used to raise demand for refund of the said amount and, therefore, a false complaint has been filed with a view to avoid refund of the said amount. A suggestion was made to the effect that Bashirbhai had threatened that if the demand was not satisfied, he would file false complaint against the respondent alleging that the victim had become pregnant on account of the physical relationship with the present respondent. So far as other evidence is concerned, Dr. Basu has been examined at Exh.7. He has given details of the physical condition of the victim at the time when the examination was undertaken by him. Examination of the victim has been taken place about 7 to 8 months after the alleged act of rape and therefore, his evidence will not be material for the purpose of proving the case against the respondent. Husenmiya Mahamadmiya at Exh.11 has deposed that when he suspected about the conduct of his daughter and when enquiry was made, his daughter told him that the respondent had committed rape on her. There is slight contradiction on this aspect of the case. The father has stated in his evidence that on enquiry, the victim has conveyed the aforesaid fact to him. On the other hand, the victim had deposed before the trial court that her sister had conveyed the aforesaid fact to her father. Even otherwise, it may not be proper for the father to enquire about such an information from the daughter and the daughter would convey the same directly to the father. It is more so, when the daughter could convey it

to the mother. Any way, thee is a little sort of contradiction as referred to above.

15. So far as the threat is concerned, the complainant has admitted that he had not stated in his FIR that his daughter told him that the respondent had given threat to her that in case she would inform any one about the incident in question, she would be killed. Therefore, the fact of threat can be said to have been introduced at a later stage. PW 3-Jayantibhai Shankarbhai at Exh.13 was working as a clerk in the office of the Mamlatdar and he had brought with him the birth record showing the birth date of the victim to be 19/30.10.1968. It is true that name of the victim has not been stated in the document. However, when the child has not been named, then normally, name would not be recorded in the birth register. However, the evidence of this witness showing that the victim was below the age of 16 years in the year 1993, gets corroborated from the evidence of Dr. Basu who has also deposed that the victim was about 16 years of age at the time of her examination by him. Even the trial court has also recorded a finding that the victim was below the age of 16 years at the relevant time. There is no reason to discard the said finding of the trial court. PW 4 Sarifa bibi Exh.15 is the victim and she, in her evidence, has stated as above. There are houses around the place of incident in question and, therefore, if somebody would enter the aforesaid place where the offence was allegedly committed, it would be noticed by certain other persons. It may be true that there may not be any evidence to an actual offence of rape but there would be evidence to show that the respondent and the victim both had gone to the place of offence together. There is no such evidence on record and no such witness has been examined by the prosecution in order to prove the said circumstances against the respondent. PW 5 - Kantilal Hemabhai Exh.18 was Police Station Officer before whom the father of the victim had lodged FIR. It is produced at Exh.12. PW 6 Baldevsinh Chandansinh at Exh.20 was the PSI of Sayajiganj Police Station in November, 1983. He had partly investigated the case. It appears that the investigation was started by PSI, Kantibhai Virabhai at Exh.21. But he was on leave for some time and therefore, he had entrusted the investigation to PSI, Baldevsinh Chandansinh at Exh.20 who, on return from leave, had again handed over the investigation to Mr Kantibhai Exh.21. Mr Kantibhai Virabhai has also filed charge sheet before the trial court in January, 1984.

16. It has come in evidence through cross examination of PSI, Kantibhai Virabhai at Exh.21 that he had not enquired from the area of Siddharthnagar Society in order to ascertain as to who was the contractor. He has further deposed that he had not recorded statements of witnesses staying around the aforesaid society or the two other societies where the construction work was going on.

17. It is also required to be considered that the victim has deposed before the trial court that after committing rape, the respondent had given threats to her as aforesaid. During the cross examination of PSI Kantibhai Exh.21, it has come out that the said fact was not disclosed by the victim to him during her statement recorded under section 161 of the Code. It is, therefore, clear that the informant had not stated that the aforesaid fact in his FIR and even the victim had not stated in her statement that threat was given to her by the respondent. Even otherwise, it is very difficult to accept that the victim was under continuous threats from the respondent. It is not her case that she was under constant threats from the respondent nor it is in evidence also. There is no material to show that the respondent had extended threats to the victim. There is no evidence on record to show that the victim was under continuous threats from the respondent. In above view of the matter, the entire case of the prosecution that because of the threat of the respondent, the victim had not conveyed the incident in question either to the father or to the mother or to the sisters, is not acceptable. The trial court has considered the entire evidence on record and has found that though there is an allegation of rape against the respondent, there is probability that the rape may have been committed by Jamirbhai or by someone else.

18. In view of the aforesaid state of affairs, it is very clear that so far as the age of the victim is concerned, it cannot be disputed that she is below 16 years of age. She was found pregnant and she has given birth to a girl child which indicates that she had some physical relation with some male person. She was unmarried at the relevant time. There is no dispute of the same. It seems that someone had physical relations with the victim before 8 to 9 months. At the same time, it has also come on record that after giving birth to a child, the victim has registered the said fact of birth which can be gathered from the birth certificate at page 38 Exh.17. There, it is shown that the victim had given

birth to a girl child on 21.2.1984 at 3.10 p.m. and the birth was registered on 23.2.1984. There the place of birth is shown to be Vadodara and the age of Sarifa bibi is shown to be 16. This seems to be her first delivery. In column 7 of certificate Exh.17 the name of the father is shown as Miyaji Vora i.e. the respondent. This shows that the victim had given name of the respondent as father of the child. There is no dispute about the same. At the same time, this may be treated to be an admission of the victim in her favour. We do not propose to say that the name has been falsely indicated in this certificate. However, as stated above, there are three probabilities emerging from the evidence on record. First is that the respondent might have committed rape on the victim. The second is that Jamirbhai might have had physical relationship with the victim and the third is that some stranger might have had physical relations with the victim. In the present case, we find that in view of the aforesaid three probabilities, the trial court was justified in extending benefit of doubt to the present respondent.

19. It is well settled that if two probabilities are present in a case, then the probability in favour of the defence is required to be accepted. In this aspect of the case, we can refer to a decision in the case of State of Gujarat v. Mansukhlal Lavchand Choksi, reported in 1993 (2) GLH (UJ 894) which was also a case of acquittal appeal wherein this court had observed that in case of acquittal, the appellate court should be slow and reluctant to interfere with the acquittal judgment unless it is perverse and it is imminently opposed to the evidence on record. Similar observations were found in the case of State of Gujarat v. Shreeji Agrico, reported in 1993 (1) GCD 682, wherein it has been held that the Court should consider if the assessment is unreasonable. In the case of State of Gujarat v. Subamiya Dosmohmed, reported in 1980 GLR 587, it has been observed that while appreciating an acquittal appeal, the court should give proper weightage to -

(a) Views of the trial court as to the credibility of the witness,

(b) Presumption of innocence of accused.

(c) Right of the accused to the benefit of doubt.

(d) The trial court had an advantage of

seeing the witnesses while evidence was recorded.

(e) If two views are possible, the view adopted by the trial court need not be altered.

Similar view was adopted in the case of Ishwarbhai Fuljibhai Patni v. State of Gujarat, reported in 1995 (2) GLH (UJ-1).

20. So the position before us is that the trial court has given cogent and convincing reason for not convicting the respondent and for acquitting him. Learned APP arguing the matter at length, has not been able to dislodge the reasoning and findings recorded by the trial court. In that view of the matter, when the probability in favour of the defence has not been dislodged, then there is no reason to interfere with the acquittal recorded by the trial court.

21. In above view of the matter, looking to the evidence as a whole, we find ourselves unable to disagree with the reasonings and views recorded by the trial court. This shows that there is no merit in the appeal and it deserves to be dismissed.

22. For the foregoing reasons, the present appeal is ordered to be dismissed. The judgment and acquittal order recorded by the trial court are confirmed. Bail bond, if any, stands cancelled.

[D K Trivedi, J.]

[D P Buch, J.]

msp